Supreme Court, U.S.
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UNITED STATES SUPREME COURT
OCTOBER 5, 1998, TERM

J. CHRISTOPHER TARANTINO,

Plaintiff-Appellant,

v.

DARR D. PIERCE, Individually and in his capacity as a City of Dallas Fireman,

Defendant,

CITY OF DALLAS,

Defendant-Appellee

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Fifth Circuit Court of Appeals be allowed to ignore precedent set in this Court's Leatherman decision regarding liberal pleading requirements against municipalities in civil rights cases by ignoring Leatherman in Fifth Circuit opinions that the Fifth Circuit chooses not to publish ?

2. Does the Fifth Circuit Court of Appeals' opinion conflict with this Court's Foman opinion when the Fifth Circuit affirms what amounts to a "death penalty" sanction where summary judgment is granted based upon failure to state a federal claim after limitations have run in the face of a motion for leave to amend if the court denies the motion for leave?

3. Is there a conflict in circuit precedent regarding the necessary showing to continue a summary judgment motion?

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED

(i) J. Christopher Tarantino v. Darr D. Pierce, et al., No. 97-10987, Summary Calendar, 149 F.3d 1174 (5th Cir. 1998)(unpublished decision)

(ii) J. Christopher Tarantino v. Darr D. Pierce, et al., No. 3:97-CV-0426-D (N.D. Tex. - Aug. 15, 1997)

STATEMENT OF BASIS FOR JURISDICTION

(i) The Fifth Circuit Court of Appeals' unpublished opinion was entered on June 15, 1998.

(ii) The Fifth Circuit Court of Appeals' order denying rehearing was entered on July 17, 1998.

(iii) This section is not applicable.

(iv) The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. 1251.

(v) This section is not applicable.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND REGULATIONS

(i) 42 U.S.C.A. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(ii) F.R.C.P. 15

(iii) F.R.C.P. 56

(iv) F.R.C.P. 12

STATEMENT OF THE CASE

A. STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Plaintiff's Original Petition naming the City of Dallas and Darr D. Pierce was filed on January 29, 1997 in the 192nd Judicial District Court of Dallas County, Texas (R. 008). Defendants jointly filed their Notice of Removal and Brief in the United States District Court for the Northern District of Texas, Dallas Division, on or about February 28, 1997 based upon federal question jurisdiction. (R. 001). No remand to state court was sought and no 12(b)(6) motion was filed.

A Scheduling Order was entered in the federal District Court on April 24, 1997. (R. 033). The order included, amongst others, deadlines for amending pleadings on November 3, 1997, deadlines for filing summary judgment and other dispositive motions on December 1, 1997 and a deadline for completion of discovery on February 2, 1998. (R. 034). The statute of limitations ran on May 5, 1997.

The City of Dallas filed its Motion for Summary Judgment and Brief on June 4, 1997. (R. 042). No depositions in the case had been taken at that point , however the deposition of a designated witness of the City of Dallas was scheduled to be conducted on July 2,1997(R. 97). The Plaintiff filed Plaintiff's Motion for Leave to File Amended Pleadings on June 20, 1997 (R. 103). The Plaintiff filed his Plaintiff's Motion to Continue Summary Judgment and Brief in Support Thereof on the same date (R. 096). The Plaintiff filed Plaintiff's Response to Defendant City of Dallas' Motion for Summary Judgment and Brief on June 24, 1997. (R. 133). The

City of Dallas filed Defendant City of Dallas' Response to Plaintiff's Motion for Leave to File Amended Pleadings on July 9, 1997 (R. 130). The City of Dallas filed its Defendant City of Dallas' Reply to Plaintiff's Response to its Motion for Summary Judgment on July 9, 1997 (R. 119). The City also filed its Defendant City of Dallas' Response to Plaintiff's Motion to Continue Summary Judgment on July 10, 1997. (R. 137).

The federal District Court below issued its Memorandum Opinion and Order disposing of the City's Summary Judgment Motion, Plaintiff's Motion for Leave to File Amended Pleadings and Plaintiff's Motion to Continue the Summary Judgment and Brief in Support Thereof on August 15, 1997. The federal District Court also signed a Rule 54(b) Judgment on August 15, 1997. Notice of this Appeal was given by the Plaintiff on September 11, 1997. The cause of action against the individual fireman, Defendant Darr D. Pierce is abated in the Federal District Court at this time pending the resolution of this appeal. A panel of the Fifth Circuit affirmed the District Court on June 15, 1998. (See Appendix.) The Fifth Circuit denied the Plaintiff's Petition for Rehearing on July 17, 1998. (See Appendix.)

B. STATEMENT OF FACTS

On May 5, 1995 Plaintiff J. Christopher Tarantino walked up to City of Dallas Firestation No. 17 located at 6000 Belmont in Dallas, Texas to request flares to assist disabled vehicles at a nearby intersection. The fireman, Pierce, had returned from an apparently stressful failed rescue attempt where a civilian had been swept away in flood waters. Pierce told the Plaintiff that the flares wouldn't stay lit in the rain. The

Plaintiff inquired as to what else could be done. Defendant Pierce said "Nothing". The Plaintiff responded "What?" Defendant Pierce then told the Plaintiff "Go home!" Defendant Pierce then told the Plaintiff "Go home! All you sons of bitches, joy riders and drunks should just go 'fucking' home!" The Plaintiff then said, "What are you saying?" Defendant Pierce then said "I'm in an ass-kicking mood." The Plaintiff then inquired "Who are you calling a son of a bitch?" Defendant Pierce subsequently grabbed the Plaintiff's jacket with his left hand, forearmed the Plaintiff in the chin, placed the leg behind the Plaintiff's legs and dropped the Plaintiff to the ground and pushed his fist into the Plaintiff's windpipe. (R.064-071,074-077,080-081). Plaintiff was severely injured as a result of the incident. (R. 064-071,074-077,080-081,118).

ARGUMENT

A. THE FIFTH CIRCUIT IGNORED LEATHERMAN IN ITS UNPUBLISHED OPINION BELOW

The Fifth Circuit ruled in an unpublished opinion that there was no abuse of discretion in denying the Plaintiff's motion for leave to amend because of the claimed futility of the amended complaint. The Fifth Circuit's opinion holds that a heightened pleading standard would be required for the amended complaint to properly allege liability against the City of Dallas pursuant to section 1983. The Fifth Circuit's opinion holds that something other than a general reference to municipal liability based on a pattern, practice or policy of constitutional violations or inadequate training is required to successfully plead against a municipality pursuant to section 1983. That analysis is in conflict with Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163,

168 (1993).

In fact, Leatherman requires only that fair notice of the claim be provided. Leatherman, 507 U.S. at 168. The Leatherman complaint alleged a failure to formulate and implement an adequate policy of training. The Fifth Circuit referred to Leatherman's pleadings of municipal liability as "boilerplate". Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 954 F.2d 1054, 1056 (5th Cir. 1992), reversed, 505 U.S. 1243.

The City of Dallas' response to the Plaintiff's motion for leave to amend demonstrates that the City received fair notice of the proffered municipality liability allegations. (R. 130-136). As such, the "futility factor" in Foman should not serve as a basis for affirming the trial court's ruling on the Plaintiff's motion for leave to amend. Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962) (Plaintiff would concede that the language in the motion for leave to amend references adding "an allegation to make it clear that the City of Dallas is alleged to be liable vicariously for the constitutional deprivation of its employee" and was technically inappropriate even though the general concept of the claim of municipal liability is to hold the entity responsible for the actions of its employees or agents pursuant to the Monell standard. Monell v. Department of Soc. Servs, 436 U.S. 658, 691 (1978)).

The body of the proffered amended complaint clearly alleges, in general terms, liability pursuant to Monell and Canton. See City of Canton v. Harris, 489 U.S. 378, 385 (1989). As such, The Fifth Circuit's opinion should be withdrawn and the ruling below on the motion for leave should be reversed and the cause remanded to allow amendment and further proceedings.

B. THE FIFTH CIRCUIT OPINION CONFLICTS WITH FOMAN AND WRONGFULLY AFFIRMED WHAT AMOUNTS TO A "DEATH PENALTY" GIVEN THE POSTURE OF THE CASE BELOW

This case was removed on or about February 28, 1997, by the City of Dallas. No Rule 12(b)(6) motion was filed. The City of Dallas waited until after the running of the statute of limitations on May 5, 1997, before it filed its motion for summary judgment. (R. 001-007, 015-021, 046-095). As a result of the timing of the City of Dallas' procedural attack on the Plaintiff's pleadings, irreparable prejudice and harm will have occurred to the Plaintiff if this Court does not reverse its decision. Undue prejudice to the party moving for leave to amend should be considered in the ruling on such a motion. H. H. Henderson v. United States Fidelity and Guaranty Company, 620 F.2d 530, 534 (5th Cir. 1980); Bamm, Inc. v. GAF Corporation, 651 F.2d 389, 391 (5th Cir. 1981); Lone Star Motor Import v. Citroen Cars Corporation, 288 F.2d 69, 75-77 (5th Cir. 1961). The Fifth Circuit's decision ignores the holding in these cases.

The ruling by the District Court based on the failure to state a federal cause of action against the City of Dallas is akin to a Rule 12(b)(6) motion. (A valid state law claim was alleged against the City of Dallas even if the claim was subject to an exclusion akin to an affirmative defense under the Texas Tort Claims Act. Delaney v. University of Houston, 835 S.W.2d 56, 58 (Tex. 1992)). In most such cases, the unsuccessful non-movant must be given an opportunity to file an amendment unless it appears reasonably certain that there is no evidence available to make out a claim or defense. Lone Star Import, Inc., 288 F.2d at 77. See O'Quinn v. Manuel, 767 F.2d 174, 179 (5th Cir. 1985) (remand to amend is appropriate if dismissed

for failure to state a claim). Leave to amend is especially appropriate when the trial court has dismissed the complaint for failure to state a cause of action. Griggs v. Hines Junior College, 563 F.2d 179 (5th Cir. 1977)(per curiam). Again, the panel's opinion does not appear to have considered these cases.

In fact, summary judgment for failure to state a claim based solely on the pleadings is the functional equivalent of a 12(b)(6) motion. North Arkansas Medical Center v. Barrett, 926 F.2d 780 (8th Cir. 1992). Typically, leave to amend is allowed after granting a Rule 12(b)(6) motion. Griggs, 563 F.2d at 179; Parnes v. Gateway 2000, Inc., 122 F.3d 539 (8th Cir. 1995). This is done to allow cases to be decided on the basis of the substantive rights involved and not technical pleading defects. The same rationale should apply in the Fifth Circuit under these facts as in other circuits.

The fact that allowing the amendment (which the City of Dallas anticipated both in its answer and in its motion for summary judgment) would have changed the theory of the case (and avoided a "death penalty" for the Plaintiff) should not support a finding of lack of abuse of discretion, particularly in light of the significant prejudice that will potentially befall the Plaintiff. Even in Foman, this Court allowed an amendment even though it changed the theory of the case after dismissal of an alleged breach of oral contract claim based upon the statute of frauds. This Court found no apparent or declared prejudice in a case that was in virtually the same procedural posture as this one. Foman, 371 U. S. at 178 (1962). The judgment here, rendered after the statute of limitations ran, will potentially result in extreme prejudice to the Plaintiff. That prejudice provides a strong basis for granting the motion for leave to amend even in the face of any possible prejudice to the City. Dussouy v. Gulf Coast Investment Corporation, 660 F.2d 594,

600, n.3 (5th Cir. 1980); Lone Star Motor Import, Inc., 288 F.2d at 76. The Fifth Circuit's opinion ignores this law.

C. THE PANEL OPINION IS IN CONFLICT WITH OTHER CIRCUIT PRECEDENT REGARDING THE BURDEN TO CONTINUE SUMMARY JUDGMENT.

There are at least three extant standards for granting a motion to continue summary judgment in the Fifth Circuit. Krim, cited by the Fifth Circuit in its opinion, requires that a party show "by some statement, preferably in writing, but not necessarily in the form of an affidavit, why he needs additional discovery and how the additional discovery will create a genuine issue of material fact. Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1442 (5th Cir. 1993)(emphasis added). Liquid Drill holds that a party "must specifically explain both why it is currently unable to present evidence creating a genuine issue of fact and how a continuance will enable the party to present such evidence". Liquid Drill v. U. S. Turnkey Exploration, Inc., 48 F.3d 927, 930 (5th Cir. 1995). Finally, 7547 Corporation holds that a party must request extended discovery before a ruling on summary judgment, notify the Court that further discovery is being sought and explain how it pertains to the pending motion. 7457 Corporation v. Parker & Parsley Development Partners, L.P., 38 F.3d 211, 220 (5th Cir. 1994). An equivalent statement in writing that conveys the needs for additional discovery should be treated as a motion to continue. Enplanar, Inc. v. Marsh, 11 F.3d 1284, 1291 (5th Cir. 1994).

The opinion below in effect required the Plaintiff to prove its case on the merits to allow a continuance of the summary judgment. This conflicts with other circuit opinions and Rule 56(f). See, Wallace v. Brewnell Pontiac-GMC Co.,

703 F.2d 525, 527 (11th Cir. 1983); Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1522 (10th Cir. 1992).

The Plaintiff's motion to continue the summary judgment and the "equivalent statement", the Plaintiff's response to the City's motion for summary judgment and, in particular, the Plaintiff's affidavit attached thereto demonstrated that the Plaintiff satisfied the three requirements set out in 7457 Corporation and also satisfied the holding in Liquid Drill. The evidence in the record also arguably satisfied the requirement of Krim. The motion to continue the summary judgment and the equivalent statement in the form of the Plaintiff's response to the City's motion for summary judgment did not amount to vague assertions that some unspecified facts might be adduced with additional discovery. Of course, the Plaintiff typically cannot and should not be required to predict without fail the exact factual information that may be uncovered by additional discovery. The Plaintiff, however, is required to give the Court some idea of how the requested discovery might reasonably be supposed to create a factual dispute. Enplaner, Inc., 11 F.3d at 1292. Plaintiff would urge that the requirements of 7547 Corporation be adopted as it is the most workable standard that reasonably assures the Court of the legitimacy of any need for additional discovery. It also allows a continuance without requiring that the movant show the exact manner in which the unconducted discovery will be able to defeat the summary judgment. As such, the Fifth Circuit's ruling should be reversed.

Respectfully submitted,

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APPENDIX

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC, United States Court of Appeals for the Fifth Circuit, 07-17-98 ..... A-1 - A-2

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-10987

J CHRISTOPHER TARANTINO

Plaintiff - Appellant

V.

DARR D PIERCE, Individually and in his capacity as a City of Dallas Fireman

Defendant

CITY OF DALLAS

Defendant - Appellee

.....

Appeal from the United States District Court for the Northern District of Texas, Dallas

.....

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 6/15/98, 5 Cir., _____ , _____ F.3d _____)

Before REAVLEY, KING and DAVIS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-10987
Summary Calendar

J. CHRISTOPHER TARANTINO,

Plaintiff-Appellant,

versus

DARR D. PIERCE, Individually and in his capacity as a City of Dallas Fireman,

Defendant,

CITY OF DALLAS,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas (3:97-CV-426-D)

Before REAVLEY, KING and DAVIS, Circuit Judges.

PER CURIAM:*

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent

Appellant J. Christopher Tarantino sued Darr Pierce, a firefighter for the City of Dallas, and the City of Dallas (City) for injuries allegedly sustained during an altercation between Tarantino and Pierce. The district court granted summary judgment for the City, certifying the partial judgment as final and appealable under Fed. R. Civ. P. 54(b). Tarantino appeals the judgment in favor of the City, arguing that he raised fact issues precluding summary judgment on his federal and state claims. He also argues that the district court erred in denying his motions for leave to amend and to continue the summary judgment proceedings to allow for further discovery. We affirm.

Summary judgment was properly granted on the state law negligence and gross negligence claims. The complaint alleged that on May 5, 1995, Pierce "physically assaulted, battered and officially pressed"[1] Tarantino. Tarantino asserted in an affidavit that he was attacked by Pierce, "who appeared to be in a violent rage for no provocation after asking for assistance for disabled motorists." This incident occurred at a fire station.

Under the Texas Tort Claims Act, sovereign immunity is not waived on any claim "arising out of assault, battery, false imprisonment, or any other intentional tort . . . ."[2] Even if the

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except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] In his motion for leave to amend, Tarantino explained that "pressed" in the original complaint should have read "oppressed."

[2] TEX. CIV. PRAC. & REM. CODE ANN. §101.057 (West 1997). The Act applies to political subdivisions of the state,

claim can be characterized as one for negligence or gross negligence, sovereign immunity is only waived if the injury arises from the operation or use of a motor-driven vehicle or equipment, or was caused "by a condition or use of tangible personal or real property."[3] Tarantino's alleged injury does not fall within these categories.

While Tarantino argues that he was injured when Pierce threw him to the ground, this "use" of real estate was so incidental to the alleged physical assault that we do not believe Texas has waived sovereign immunity from such a claim. The Texas Supreme Court recently emphasized that "the waiver of immunity in the Tort Claims Act is not, and was not intended to be, complete."[4] It rejected the notion that the mere involvement of property in the injury is sufficient to waive sovereign immunity.

> If only involvement were required, the waiver of immunity would be virtually unlimited, since few injuries do not somehow involve tangible personal or real property. Requiring only that a condition or use of property be involved would conflict with the Act's basic purpose of waiving immunity only to a

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including cities. *Id.* §101.001(2)(B).

[3] *Id.* §101.021.

[4] *Dallas County Mental Health & Mental Re Ctr. v. Bossley*, 1998 WL 169715, at *3 (Tex. Apr. 14, 1998).

limited degree.[5]

Instead, the court held that "[p]roperty does not cause injury if it does no more than furnish the condition that makes the injury possible."[6] The plaintiffs had alleged that their son escaped from a mental institution and committed suicide because a technician had unlocked an outer door and an inner door was left unlocked. The plaintiffs alleged that unlocking the outer door was a "use" of property, and that the unlocked inner door was a "condition" of the property. The court held that although the son's "escape through the unlocked doors was part of a sequence of events that ended in his suicide, the use and condition of the doors were too attenuated from [the son's] death to be said to have caused it."[7] In the pending case, the "use" of property was even more incidental to the injury.

As to Tarantino's federal claim under 42 U.S.C. § 1983, the complaint did not assert a federal cause of action against the City. It alleged that "[t]he City is vicariously liable for any negligence of Darr D. Pierce in this regard." Municipalities cannot be held liable under § 1983 under a *respondeat superior* or vicarious liability theory. [8] Further, § 1983 liability does not extend to conduct that is merely

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[5] *Id.* at *4.

[6] *Id.*

[7] *Id.*

[8] *City of Canton v. Harris*, 489 U.S. 378, 385 (1989).

negligent.[9]

Tarantino complains that the district court erred in denying his motion to amend his complaint and his motion to continue the summary judgment motion to allow additional discovery. The substantive law of municipal liability is relevant to both issues. Under § 1983, "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort."[10] An official policy is:

> 1. A policy statement, ordinance, regulation, or decision that is official adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be

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[9] *Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Davidson v. Cannon*, 474 U.S. 344, 349 (1986).

[10] *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 691 (1978).

> attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.[11]

In the case of a municipality's alleged failure to train its employees, the Supreme Court has rejected a gross negligence standard in favor of a deliberate indifference standard. The plaintiff must show a deliberately indifferent policy of training that was the "closely related" cause of the constitutional violation.[12]

"Whether leave to amend should be granted is entrusted to the sound discretion of the district court, and that court's ruling is reversible only for an abuse of discretion."[13] Leave to amend need not be given if the complaint as amended would be subject to dismissal.[14] In ruling on a motion for leave to amend, the court may consider whether granting leave to amend would impose undue prejudice on

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[11] *Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir. 1984)(en banc).

[12] *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 (5th Cir. 1994) (en banc) (discussing *Canton, supra* n.8).

[13] *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993).

[14] *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 546 (5th Cir. 1980).

the opposing party.[15]

Fed. R. Civ. P. 56(f) provides that the court may continue a summary judgment motion to allow additional discovery, "[s]hould it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition." Rule 56(f) is only applicable to situations where a party shows that the additional discovery will aid it in presenting a viable opposition to the summary judgment motion.[16] A party seeking continuance of a motion for summary judgment in order to obtain further discovery must show "why he needs additional discovery and *how* the additional discovery will create a genuine issue of material fact. The nonmoving party 'may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts.'"[17] We review the district court's denial of a Rule 56(f) motion for abuse of discretion.[18]

We conclude that the district court did not abuse its discretion in the denying the motions to amend and for a Rule 56(f) continuance. First, granting the motions would have prejudiced the City, which had already moved for summary judgment in reliance on the claims alleged in the original

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[15] *Louisiana v. Litton Mortgage Co.*, 50 F.3d 1298, 1303 (5th Cir. 1995).

[16] *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990).

[17] *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir. 1993) (citations omitted; emphasis in original).

[18] *Id.* at 1441.

complaint. The original complaint did not include a federal claim against the City. We have noted as a general proposition that "[a] party should not, without adequate grounds, be permitted to avoid summary judgment by the expedient of amending its complaint.[19]

Second, Tarantino did not show that he even understood the burden he faced in making a showing of municipality liability under § 1983, much less that he was capable of making such a showing with further discovery. The proposed amended complaint added an allegation that "[t]he City is alternatively liable because of a pattern, practice or policy of constitutional violations or grossly inadequate training that was likely to result in constitutional violations." The Rule 56(f) motion states that plaintiff and his attorney "are aware of police and fire department employees who have committed violent acts due to job-related stress and who feel that the City's response to jobrelated stress is grossly inappropriate." The references to "grossly inadequate" or "grossly inappropriate" training suggest a gross negligence standard. As explained above, municipal liability for failure to train cannot be based on a gross negligence; the more stringent deliberate indifference standard applies. The motion for leave to amend states that plaintiff "seeks to add an allegation to make it clear that the City of Dallas is alleged to be liable vicariously for the constitutional deprivation of its employee." As explained above, municipalities cannot be held vicariously liable under § 1983. Tarantino's affidavit states that he has heard City firemen admit that job-related stress has brought them to the verge of violence, that City supervisors discouraged them from getting appropriate help, and that "I also have the sense that these problems may

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[19] *Overseas Inns S.A. P.A. v. United States*, 911 F.2d 1146, 1151 (5th Cir. 1990) (quoting district court below).

have been widespread." However, Tarantino did not indicate that he understood, intended to prove, or was capable of proving that the City's practice of discouraging firemen from getting appropriate psychological help was so common and well settled as to constitute a custom that fairly represents municipal policy, or that actual or constructive knowledge of such custom is attributable to the governing body of the municipality or to an official to whom that body has delegated policy-making authority. As explained above, the plaintiff must make such showings to prevail against a municipality under § 1983.

Finally, we note that the proposed amended state a claim against the City under state law. can be read to assert a negligent training claim the waiver of sovereign immunity under state law the operation of motorized vehicles or equipment caused by the operation or use of tangible personal or real property, as explained above. A negligent training claim does not fall under these exceptions to sovereign immunity.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

J. CHRISTOPHER TARANTINO,	§	
Plaintiff,	§	
VS.	§	Civil Action No.
	§	
	§	3:97-CV-0426-D
	§	
DARR D. PIERCE, et al.,	§	
Defendants.	§	

JUDGMENT

For the reaons set out in a memorandum opinion and order filed today, it is ordered and adjudged that plaintiff's action against defendant the City of Dallas (the "City") is dismissed with prejudice.

The City's taxable costs of court, as calculated by the clerk of court, are assessed against plaintiff.

Pursuant to Fed. R. Civ. P. 54(b), the court expressly determines that there is no just reason for delay and directs the clerk of court to enter this as a final judgment.

Done at Dallas, Texas this 15th day of August, 1997.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

J. CHRISTOPHER TARANTINO,	§	
Plaintiff,	§	
VS.	§	Civil Action No.
	§	3:97-CV-0426-D
DARR D. PIERCE, et al.,	§	
Defendants.	§	

MEMORANDUM OPINION
AND ORDER

Plaintiff J. Christopher Tarantino ("Tarantino") sues defendants Darr. D. Pierce ("Pierce") and the City of Dallas (the "City") pursuant to 42 U.S.C.§ 1983 and on pendent state-law grounds. The City moves for summary judgment. Tarantino moves for a continuance in order to conduct further discovery, and for leave to amend his complaint. For the reasons that follow, the court grants the City's motion for summary judgment, and denies Tarantino's motions for a continuance and for leave to amend.

I

The court recounts the evidence and inferences favorably to Tarantino as the summary judgment nonmovant.[20] On the night of May 5, 1995 Tarantino came upon the scene of

[20]Many of the facts are vigorously disputed. The court does not suggest that a trier of fact would or would not find the facts are they are recounted here.

an automobile accident while driving a co-worker, Richard Santiago ("Santiago"), home from work. Dallas was experiencing severe flooding at the time due to torrential rainfall. The flooding cut off the electricity in large portions of the city and several of the traffic signals were not functioning along the street on which Tarantino was driving.

Tarantino stopped his truck abruptly when he realized that there were several wrecked automobiles in and immediately beside the road in front of him. Several of the vehicles were empty and had obviously been damaged some time earlier as a result of the flooding. Two of the vehicles had just recently collided. Tarantino and Santiago approached the vehicles and determined that the occupanats were not seriously injured. Santiago then began to direct traffic around the cars. After waiting a few minutes to see if emergency personnel would arrive, Tarantino and Santiago drove around the block to a nearby fire station. Tarantino approached the station, and Santiago returned to the accident on foot.

Tarantino called out to defendant Pierce - a City firefighter - through the open garage door of the fire station. Pierce responded and approached him. Tarantino explained that there had been an accident around the corner and that more accidents were likely to result due to the poor lighting. He asked if the Fire Department had flares to divert traffic around the accident. Pierce stated that flares would not stay lit due to the continuing rain. Tarantino responded by asking what could be done, and Pierce responded, "Nothing." An argument ensued in which Pierce allegedly directed various profanities at Tarantino. When Tarantino confronted Pierce about this, Pierce pressed against him and told him to go home. In an attempt to acquiesce, Tarantino raised his hand and began to say something. Pierce grabbed Tarantino by the jacket, struck him with his forearm in the chin, and threw him to the ground.

Once Tarantino was on the ground, Pierce held his jacket with one hand, pressed his fist into Tarantino's neck, and yelled "Go home." Pierce then returned to the station. Tarantino got back in his truck, picked up Santiago, resumed home, and called the police. Terantino also reported the incident to the Fire Department internal affairs section.

Tarantino alleges that he has suffered physical injury, mental anguish, lost earnings and earning capacity, and disfigurement as a result of the assault. The City moves for summary judgment as to all of Tarantino's claims

II

The court addresses as a threshold matter Tarantino's request for additional time to respond to the City's summary judgment motion.

Fed. R. Civ. P. 56(f) authorizes a continuance "[s]hould it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition . . . The Rule is an essential ingredient of the federal summary judgment scheme, and provides a mechanism for dealing with the problem of premature summary judgment motions." *Celotex Corp. v. Catrett*, 477 J.S. 317, 326 (1986). The continuance authorized by Rule 56(f) is a safe harbor built into the rules so that summary judgment is not granted prematurely. *Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d 129, 136 (5th Cir. 1987). To comply with the rule, the party opposing summary judgment need only file the specified non-evidentiary affidavit, explaining why it cannot oppose the summary judgment motion on the merits. *Id.* Nevertheless, a claim that further discovery or a trial might reveal facts of which the nonmovant is currently unaware is insufficient. *Washington v.*

Armstrong World Indus., Inc., 839 F.2d 1121, 1123 (5th Cir. 1988). The party may not rely on vague assertions that additional discovery will produce needed, but unspecified facts, *Union City*, 823 F.2d at 137, but instead must identify a genuine issue of material fact that justifies the continuance pending further discovery. *See Woods v. Federal Home Loan Bank Bd.*, 826 F.2d 1400, 1415 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). A party seeking a continuance of a motion for summary judgment must demonstrate why it needs additional discovery and how the additional discovery will create a genuine issue of material fact that requires postponement for discovery, *see McCarty v. United States*, 929 F.2d 1085, 1088 (5th Cir. 1991), and must present specific facts explaining its inability to make the substantive response required by Rule 56(e), *see Solo Serve Corp. v. Westowne Assocs.*, 929 F.2d 160, 167 n.25 (5th Cir. 1991).

Pierce and others in the Fire Department have testified that Pierce's violent response to Tarantino was caused at least in part by the fact that he had just returned from an unsuccessful rescue attempt in which one citizen lost her life when she was swept away by flood waters and two Firefighters were also nearly swept away. Tarantino contends that he is "aware" of other police and fire department employees who have committed violent acts due to job-related stress and who feel that the City's response to employee stress is inadequate. He believes that further discovery will "flush out" information relating to the City's inadequate training of Police and Fire Department employees with regard to coping with stress. Tarantino argues that a continuance is warranted because he has not yet had an opportunity to depose its designated witness from the City on issues relevant to the City's liability. He argues that such a deposition, at a minimum, must be concluded before he can properly respond to the City's motion.

Tarantino seeks a continuance to conduct discovery with respect to a claim that he has not even made in a live pleading. Tarantino's complaint alleges only that the City is subject to vicarious liability for the actions of Pierce, and contains no allegation that the City is liable based on a failure to adequately train its employees. A continuance is not warranted where the discovery the movant hopes to obtain is not pertinent to any of the claims in the lawsuit.

Even if Tarantino had stated a cause of action for failure to train, he has not identified evidence that would enable him to avoid summary judgment on such a claim. Tarantino contends in his motion that the City has maintained a grossly inadequate program for training employees of the Police and Fire Departments to cope with high levels of stress, resulting in an increased likelihood of constitutional violations. In order to establish municipal liability on the basis of a failure to train, a plaintiff must be able to show that the failure amounts to deliberate indifference to the rights of those who come in contact with the party's employees. *See City of Canton v. Harris*, 489 U.S. 378, 388 (1989). A showing of gross negligence on the part of the municipality is insufficient. *Id.* at 389 n.7. Evidence that Police and Fire Department employees have engaged in violent acts in the past as a result of job-related stress, and that they believe that the City's response to that stress has been inappropriate, is insufficient to demonstrate that the City was *deliberately* indifferent to the rights of individuals such as Tarantino. Tarantino has failed to specify how any discovery he might obtain would enable him to raise a fact issue as to the City's deliberate indifference.

Accordingly, Tarantino's motion for Rule 56(f) relief is denied.

III

The court now turns to the merits of Tarantino's claims.

A

The City moves for summary judgment as to his § 1983 action on the ground that it cannot be held vicariously liable for the constitutional violations of its employees.

Tarantino does not appear to allege that the City is liable pursuant to § 1983. He avers in his complaint that the City is vicariously liable for Pierce's negligence. Assuming *arguendo* that Tarantino has stated a claim against the City pursuant to § 1983, the City is still entitled to summary judgment.

A municipality may not be held vicariously liable pursuant to § 1983 for the actions of its employees. *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978) (holding that "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.") In order for to avoid summary judgment, Tarantino must offer evidence that would allow a reasonable jury to find that his injury resulted from the exercise of the City's "official policy." *Id.* at 694; *Bennett v. City of Slidell*, 728 F.2d 762m 766 (5th Cir. 1984) (en banc), *cert. denied*, 472 U.S. 1016 (1985). An official policy is:

> 1. A policy statement, ordinance, regulation, or decision that is official adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent, widespread practice of city officials or employees, which, although not

> authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined.

Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir.), *reh'g granted on other grounds*, 739 F.2d 993 (1984) (en banc).

Thus when someone seeks to establish an "official policy" on the basis of an informal but "persistent, widespread practice of city officials or employees," he must make a showing both of the existence of the practice *and* of actual or constructive knowledge on the part of the government body or officials to whom the body has delegated policymaking power. Tarantino has not alleged that the City has such an "official policy."

Accordingly, the City is entitled to summary judgment dismissing Tarantino's § 1983 claim.

B

The City also moves summary judgment as to Tarantino's state-law claims for negligence and gross negligence. It asserts that the claims do not fall within any of the exceptions to municipal immunity found in the Texas Tort Claims Act ("TTCA"). Tex. Civ. Prac. & Rem. Code Ann.

§§101.001-101.107 (West 1986). The court agrees.

The tort liability of the state and its political subdivisions is strictly limited. Except where expressly waived by the provisions of the TTCA, a municipality has complete immunity from tort liability. The TTCA provides, in pertinent part, as follows:

> A governmental unit in the state is liable for:
>
> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within the scope of his employment if:
>
> (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
>
> (B) the employee would be personally liable to the claimant according to Texas law; and
>
> (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (West 1986).

Tarantino has failed to articulate how his claims of negligence and gross negligence fall within one of the recognized exceptions to municipal immunity. Even if Tarantino's portrayal of the facts in the instant case is accepted as true, it is clear that none of his injuries was caused by the

wrongful or negligent use by a City employee of a motor-driven vehicle or motor-driven equipment, or the condition or use of tangible personal or real property. Accordingly, the City is immune from liability, and is entitled to summary judgment on Tarantino's state-law claims.

IV

Tarantino moves for leave to amend his complaint to add a claim that the City is liable pursuant to § 1983 for maintaining a policy or practice of grossly inadequate training of firefighters that was likely to lead to constitutional violations. The court denies the motion.

A

The decision to permit or deny amendment is within the court's discretion and "is reversible only for abuse of that discretion." *Overseas Inns S.A. P.A. v. United States*, 911 F.2d 1146, 1150 (5th Cir. 1990). In making this decision, the court may consider such factors as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. . . . *Id.* at 1150-51 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

The court concludes that to permit Tarantino to amend his complaint would unduly prejudice the City. Tarantino filed his motion to amend almost immediately after the City moved for summary judgment. "To grant [Tarantino] leave to amend is potentially to undermine [the City's] right to prevail on a motion that necessarily was prepared without reference to an unanticipated amended complaint . . . A party should not,

without adequate grounds, be permitted to avoid summary judgment by the expedient of amending its complaint." *Overseas Inns*, 911 F. 2d at 1151 (quoting this court's opinion below).

B

The court may also properly deny leave to amend when the amendment would be futile. *See Holmes v. National Football League*, 939 F.Supp. 517, 525 (N.D. Tex. 1996) (Fitzwater, J.). Tarantino's claim for failure to train cannot be successful unless he can demonstrate that the City was deliberately indifferent to the rights of citizens with whom its employees come into contact. *See supra* § II. Tarantino has neither adduced evidence indicating that the City has been deliberately indifferent, nor demonstrated that he might discover evidence that would enable him to raise a fact issue as to the City's deliberate indifference. Thus the reasons that justify a denial of Tarantino's motion for a continuance also justify the denial of his motion to amend.

* * *

Tarantino's motion for continuance and motion to amend are denied. The City's motion for summary judgment is granted. The court has filed today a Rule 54(b) judgment in favor of the City.

SO ORDERED.

August 15, 1997.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

FRCP 15. AMENDED & SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments To Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freed when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurFence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the park to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the

adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

FRCP 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without

substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the avant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

FRCP 12. DEFENSES & OBJECTIONS– WHEN & HOW PRESENTED –BY PLEADING OR MOTION –MOTION FOR JUDGMENT O N TH E P LEA D I N GS

(a) When Presented.

(1) Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer

(A) within 20 days after being served with the summons and complaint, or

(B) if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a repb to a counterclaim in the answer within 20 days after service of the answer, or, if a repb is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.

(3) The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is

asserted.

(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters these periods of time as follows:

(A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be

given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion To Strike. Upon motion made by a party

before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.